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No. 98

In the Supreme Court of the United States

OCTOBER TERM, 1931

ARIZONA GROCERY COMPANY, A CORPORATION, PETITIONER

v.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, A CORPORATION, ET AL., RESPONDENTS

AND

ARIZONA GROCERY COMPANY, A CORPORATION, PETITIONER

v.

SOUTHERN PACIFIC COMPANY, A CORPORATION, ET AL., RESPONDENTS

APPLICATION FOR LEAVE TO FILE BRIEF, AND BRIEF FOR INTERSTATE COMMERCE COMMISSION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

H. L. UNDERWOOD,
Attorney.

DANIEL W. KNOWLTON,
Chief Counsel.

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APPLICATION FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Comes now the Interstate Commerce Commission, by its Chief Counsel, and respectfully requests leave of the Court to file a brief on behalf of the Commission in support of the petition for certiorari, heretofore filed herein. The interest of the Interstate Commerce Commission in having a final determination of the case and its suggestions as to some of the important considerations involved are set forth in the brief hereto attached.

DANIEL W. KNOWLTON,
Chief Counsel.

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BRIEF FOR INTERSTATE COMMERCE COMMISSION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT

Pursuant to leave of Court, the Interstate Commerce Commission, hereinafter referred to as the Commission, submits this brief in support of the petition for writ of certiorari herein.

The decision of the Circuit Court of Appeals for the Ninth Circuit, rendered March 23, 1931, which it is sought to review, is not yet reported. It reversed the judgments of the United States District

Court for the District of Arizona which sustained and enforced an order of reparation made by the Commission. (140 I. C. C. 171.)

The filing of this brief is prompted by the importance, in the view of the Commission, of securing a finally determinative adjudication of the questions presented in this case, as to the scope and extent of the power and authority of the Commission in respect of awarding reparation.

THE FACTS

By its decision of June 22, 1921, the Commission found unreasonable the rates of $1.045 per hundred pounds on sugar from California points to Phoenix, Ariz., and that for the future rates on that commodity would be unreasonable to the extent that they exceeded 96.5 cents. (*Phoenix Chamber of Commerce et al.* v. *Director General,* 62 I. C. C. 412.) An order entered pursuant to these findings required the defendant carriers to establish rates which should not exceed 96.5 cents per hundred pounds.

In compliance with that order the carriers established a rate of 96 cents. This was reduced to 86.5 cents, pursuant to the recommendation of the Commission in *Reduced Rates,* 1922, 68 I. C. C. 676, by which a general reduction of 10 per cent in rates was held justified. On January 10, 1924, the carriers voluntarily fixed a new rate of 84 cents, to conform to the long-and-short-haul provision of Section 4 of the Interstate Commerce Act.

In a decision dated January 6, 1925, the Commission again considered the rate on sugar between California and Phoenix and found it to have been and to be unreasonable to the extent that it exceeded 79 and 71 cents, prior to and subsequent to July 1, 1922. Those complainants who had made shipments were held entitled to reparation. (*Phoenix Chamber of Commerce et al* v. *Atchison, Topeka & Santa Fe Ry. Co. et al.*, 95 I. C. C. 244.) A rate of 71 cents was thereupon put into effect.

The orders involved in the instant case were made pursuant to the Commission's decision in *Traffic Bureau of Phoenix Chamber of Commerce et al.* v. *Atchison, Topeka & Santa Fe R. Co. et al.*, 140 I. C. C. 171, which awarded reparation on shipments made between February 25, 1923, and February 10, 1925. In that case the Commission held unreasonable, prior to July 1, 1922, rates in excess of 79 cents and 81 cents from southern California and northern California points, respectively, to Phoenix, and from July 1, 1922, and for the future, rates in excess of 71 and 73 cents, respectively.

The basis on which the decision of the Circuit Court of Appeals was predicated was that while in exercising its rate-making functions, the Commission is not bound by any doctrine of *res judicata*, since it is acting in its administrative or legislative capacity, yet in awarding reparation it acts in a judical capacity; that since it had in effect in 1921 prescribed as a reasonable or lawful rate a maxi-

mum rate not to exceed 96.5 cents, that rate was a Commission-made rate and, hence, could not be said to be unlawful until changed by it, and therefore, exaction of such rate prior to the change could not be said to be unlawful—a tort—constituting a basis for reparation.

The view of the Commission in this regard is thus stated in its report (140 I. C. C. 171, at p. 180):

> Defendants contend that they should not be required to pay reparation on shipments which moved under rates approved or prescribed by us. We have several times announced that the doctrine of *res adjudicata* is not applied by us. *Goss v. Director General,* 73 I. C. C. 649. We reserve the right, upon a more comprehensive record, to modify our previous findings, whether in the same or a previous case, upon matters directly in issue before us as to which it clearly appears that our previous findings would not accord substantial justice under the laws which we administer. We have such a case here. For the first time the record before us is comprehensive in the evidence which it contains bearing upon the reasonableness of the rates assailed. Upon this record we reach the conclusion that the rate prescribed in the first Phoenix case, during the period embraced in these complaints, was unreasonable and that a lower rate would have been reasonable during that period. If we are within our authority in finding that a lower rate would have been reasonable, then it must

follow that shippers who paid the freight charges at the higher rate paid charges which were unreasonable, and are entitled to reparation upon adequate proof that they paid or bore such charges.

It has taken like action in other cases: *Eagle Cotton Oil Co.* v. *Southern Ry. Co. et al.*, 140 I. C. C. 131; *Arizona Corporation Commission* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 156 I. C. C. 418, 425, 426; *Brannon Coal Co.* v. *Southern Ry. Co.*, 157 I. C. C. 486, 487.

It is submitted that the fact that the Commission has once found that rates not in excess of a stated maximum will be reasonable for the future constitutes no warrant for the exaction of such rates for all time, or until the Commission revises its finding, when due to changed conditions those rates have become unreasonable.

There is an obligation upon the carrier under Section 1(5) of the Act to charge only such rates as are reasonable, and the fact that the Commission has taken no action to revise a rate once established as reasonable does not relieve the carrier of such obligation. It can not in reason be asserted that the Commission is under the necessity of constant supervision and readjustment of thousands of rates involving many carriers to the end that when once established, they be kept currently reasonable at all times. Surely Congress intended no such burden to be imposed, nor that shippers should be

prejudiced by the failure of the Commission to be at all times reviewing established rates to determine their present reasonableness.

This case presents considerations which have vital bearing upon the future course of action of the Commission in respect of reparation proceedings, and as to the extent of its power and duty therein, and it is of importance in the proper administration of the duties imposed upon it with respect to reparation proceedings that the power and authority of the Commission should be defined by this Court, in the respect that it is involved in this case.

Respectfully submitted.

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Attorney.

DANIEL W. KNOWLTON,
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